APPENDIX A

STATUTES INVOLVED

SECTIONS 2(a)(29), 11(b)(1) (A)-(C), AND 24(a) OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935.[1]

SECTION 2. (a) When used in this title, unless the context otherwise requires —

. . . .

(29) "Integrated public-utility system" means —

. . . .

(B) As applied to gas utility companies, a system consisting of one or more gas utility companies which are so located and related that substantial economies may be effectuated by being operated as a single coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation: *Provided,* That gas utility companies deriving natural gas from a common source of supply may be deemed to be included in a single area or region.

SECTION 11

. . . .

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit

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[1] 49 Stat. 810, 820-21, 834-35 (1935), as amended, 15 U.S.C. §§79b(a)(29)(B), 79k(b)(1) and 79x(a) (1964).

the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

SECTION 24.

SECTION 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the United States court of appeals within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or

in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, or any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which, upon the filing of the record shall be exclusive, to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of title 28.

SECTIONS 557 AND 706 OF TITLE 5 OF THE UNITED STATES CODE (THE ADMINISTRATIVE PROCEDURE ACT AS CODIFIED):[2]

SECTION 557. . . . .

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions —

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of —

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

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[2] 80 Stat. 387, 393 (1966), 5 U.S.C. §§557(c), 706 (Supp. II, 1965-66). The laws relating to the organization of the Government of the United States and to its civilian officers and employees, generally, including the Administrative Procedure Act, were revised, codified and enacted as Title 5 of the United States Code on September 6, 1966, by Pub. L. 89-554, 80 Stat. 378. The provisions of the Administrative Procedure Act relevant to this case were not substantially changed.

SECTION 706.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX B

ANALYSIS OF PRIOR DIVESTMENT CASES RELIED ON BY THE COMMISSION

Five of the seven divestment orders cited in the Commission's Appendix to its Findings and Opinion (A. 28) are based on the fact that the Commission did not believe the estimates or that the estimate failed to show the amount of lost economies. The other two involve substantially smaller loss ratios.

The five cited precedents which are irrelevant are:

1. *Gulf States Utilities Company (1940 figures).* Gulf States' gas properties were ordered divested in *Engineers Public Service Co.,* 12 S.E.C. 41 (1942), on the ground that the amount of increased expenses claimed did not constitute, to quote the opinion, "lost economies arising from the independent operation of the gas system, since it ignores compensating factors. These asserted losses represent 8.7 percent of the gas department's expenses, 25.6 percent of its gross income, and 32.6 percent of its net income for 1940. We believe, however, that as estimates of lost economies they are in several respects overstated."[1] The Commission noted various overstatements and concluded that it could not find that the economies lost would be substantial. The case was decided on the ground that the claimed losses had not been proved, and apparently if they had been, they would have been considered substantial. 12 S.E.C. at 81.

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[1] 12 S.E.C. at 80. It will be noted that these percentages are higher than those stated in the Appendix to the Commission's Findings and Opinion. The reason apparently is that the Commission has restated the figures in this and other cases to eliminate the effects of Federal income taxes. Respondents cannot verify the accuracy of the adjustments.

2. *Virginia Electric and Power Company (1940 figures).* Virginia's gas properties were also ordered divested in *Engineers, supra.* The Commission stated that the $71,500 of increased annual expenses claimed, "if accurate and in the absence of any benefits resulting from separation, afford an impressive basis for finding a loss of substantial economies . . . . " 12 S.E.C. at 59. However, the Commission found the increased expenditures "excessive," and concluded that "with respect to the gas properties alone, the record, if given its most liberal interpretation, would not sustain a finding of more than one-half the claimed increased *expenses.* We further conclude that the loss of economies would in fact be less than such increased expenses." 12 S.E.C. at 59, 60. The Commission's Appendix deals with this case by cutting the claimed losses in half and stating them as $35,750. Clearly, in light of the holding, the figures have to be cut by more than half, and equally clearly the holding was not that the claimed losses were not substantial nor that one-half of the claimed losses was not substantial. The holding was that the claimed losses had not been proved.

3. *St. Louis County Gas Company (1942 figures).* St. Louis County Gas was ordered divested in *North American Co.*, 18 S.E.C. 611 (1945), because to accept the $160,900 estimate of increased expenses "without further inquiry would be to distort the Act". 18 S.E.C. at 615. "Ultimately, the issue" was not the substantiality of the losses but "whether experience [would] bring about the increased costs claimed by the respondents without offsetting benefits." 18 S.E.C. at 617. The Commission found that the claimed losses did not take account of the probability of offsetting advantages and could not be found to reflect the over-all loss of economies. If they had, the case would apparently have been decided in favor of retention.

4. *Jersey Central Power and Light Company (June 30, 1949 figures).* Divestment of the gas properties of Jersey Central was ordered, on the basis of an uncontested Division position, in *General Public Util. Corp.*, 32 S.E.C. 807, 814-15 (1951). The claimed $229,398 loss of economies included no adjustments to reflect the advent of natural gas, a favorable development that was "virtually assured. As a consequence," the Commission said, "the severance study has little, if any, probative value for the purposes of this proceeding. Without the determination of the result of the introduction of straight natural gas in all three divisions upon the operations of the gas department, the increase in expenses brought about by severance cannot be evaluated". 32 S.E.C. at 836-37.

5. *Louisiana Power & Light Company (1954 figures).* The gas properties of Louisiana Power & Light were ordered divested in *Middle South Util., Inc.*, 35 S.E.C. 1 (1953). The Appendix to the Commission's Findings and Opinion in the present case cites figures for the year 1954 which obviously cannot have been the basis for a 1953 divestiture order. The Commission did not rely on figures for 1954 or any other year. The situation was just the opposite. There were no figures. "No study of any kind was introduced to show what the expense of the gas properties would be if they were operated as a separate unit". 35 S.E.C. at 12.[2]

The remaining two precedents do not support the decision but may have some relevance. They are:

1. *Philadelphia Company (1946 figures).* Divestment of Philadelphia's gas properties was ordered in *Phila-*

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[2] Two years later, in 1955, the Commission declined to reopen the case, again without reference to any figures. Middle South Util., Inc., 36 S.E.C. 383 (1955).

delphia Co., 28 S.E.C. 35 (1948). This opinion perhaps represents a relevant administrative decision as the Commission stated that even on the basis of the company's figures, the loss of economies would not be substantial. 28 S.E.C. at 52-53. However, over the next twenty pages of the opinion, the Commission enumerated the defects in the evidence. Respondents understand the substance of the decision to be that the Commission did not believe the amount of the claimed losses, as shown by its extensive treatment of the evidence. Nonetheless the opinion is somewhat ambiguous, and it is difficult to say exactly what the holding is.

2. *Northern Pennsylvania Power Company (June 30, 1949 figures).* Divestment of the electric properties of North Penn was ordered in *General Public Util. Corp.*, 32 S.E.C. 807 (1951). GPU had conceded the Commission staff's position that the electric properties could not be retained, but the Commission reviewed the staff's position and wrote a lengthy opinion.[3] It held that the evidence submitted as to estimated losses would not affect its conclusion in a prior proceeding as to the ability of North Penn to operate economically as a separate entity. 32 S.E.C. at 832. Accordingly, Respondents conclude that the Commission's holding with respect to the insufficiency of the estimated losses, even though uncontested and related to an electric company, may represent a relevant administrative decision.

[3] 32 S.E.C. at 814-15. The Commission's careful treatment of the uncontested issues in this aspect of the case and the part of the case involving the Jersey Central gas companies noted above is in marked contrast to its handling of the Section 2(a)(29)(B) issue in the instant case.

Thus the Commission's Appendix (A. 28) includes no more than two cases in which divestment may have been ordered "on the ground that the estimated loss of economies was not substantial within the meaning of Clause A." (A. 16). In one case the holding was alternative; in the other, the issue was conceded. The ratios for the NEES gas companies, based on figures as adjusted by the Commission, exceed the comparable ratios in the highest of these two precedents (for what relevance they may have) by percentages ranging from a low of 59% to a high of 342%.